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Ministère du Travail de l'Ontario

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Pay Equity Act - Amendments

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POLICY DIRECTIONS

AMENDING THE PAY EQUITY ACT

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DISCUSSION PAPER

MINISTRY OF LABOUR

FEBRUARY 1990

POLICY DIRECTIONS

AMENDING THE PAY EQUITY ACT

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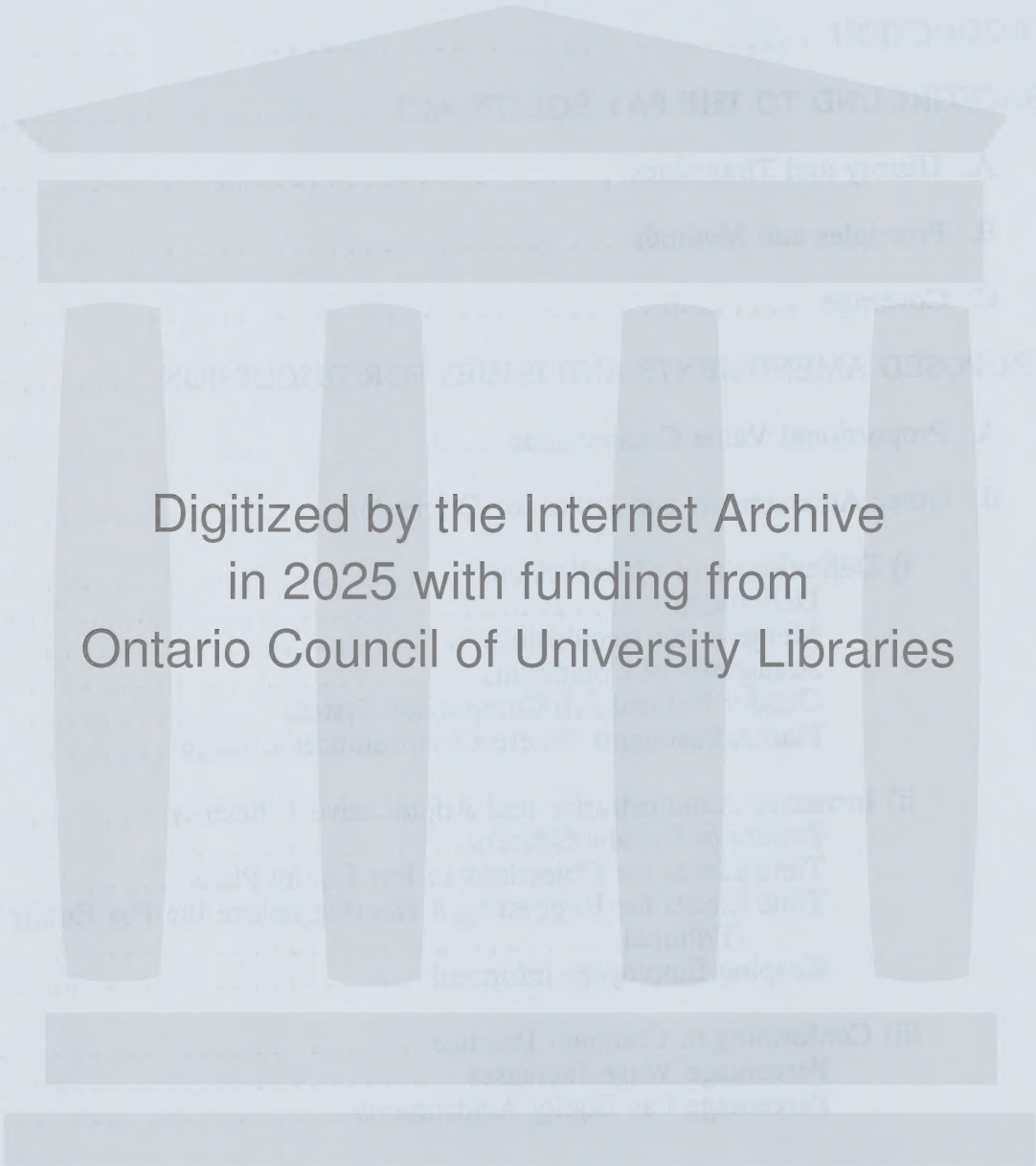

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INTRODUCTION

This paper has been prepared to assist the Ministry of Labour in a series of consultations with parties interested or involved in the implementation of the Ontario Pay Equity Act. The principal focus of the consultations concerns a proposed amendment to the Act introducing a second method of comparing female and male jobs in the workplace. The secondary focus of the consultations concerns a variety of other issues that have arisen with respect to the current Pay Equity Act which might or might not be addressed by additional amendments to the Act.

In 1986, the Government made a commitment in the Act to study various means of extending the benefit of the Pay Equity Act to women working in predominantly female sectors of the economy who, because their workplace lacks appropriate male job comparators, are unable to benefit under the terms of the Act as passed. The study was conducted by the Pay Equity Office. Their report, entitled "Report to the Minister of Labour by the Ontario Pay Equity Commission on Options Relating to the Achievement of Pay Equity in Sectors of the Economy which are Predominantly Female," was presented on October 18, 1989, and tabled in the Legislature.

After careful consideration of the Report, the Government determined that one additional method of comparing male and female jobs in the workplace should be added to the Act. The Government also determined that the availability of this method should not be restricted to employers in predominantly female sectors, but should be able to be used by all employers. The problem of finding appropriate male job comparators is most acute in predominantly female sectors of the economy, but it is by no means confined to those sectors.

The paper below consists of two parts. The first part provides additional information and background to the current Pay Equity Act. The second part outlines and discusses the Ministry's proposed amendment to introduce a new comparison method to the Act. It also presents and discusses several other problems that have become evident in the course of interpreting and applying the Act.

I. BACKGROUND TO THE PAY EQUITY ACT

A. History and Timetables

The Pay Equity Act, 1987 is unique in North America. Although some other Canadian jurisdictions have pay equity laws, Ontario is the only jurisdiction where the legislation requires the preparation of pay equity plans in both public and private sectors. The Act applies to all public sector employers regardless of size and all private sector employers with 10 or more employees in the Province.

The Act was tabled after extensive public consultations. Hearings were held around the province and submissions were received from major public and private sector employers and from employer and employee representatives. The Act was passed in June 1987 and took effect on January 1, 1988.

The Act requires that all public sector employers (as defined in a Schedule to the Act) and private employers with 10 or more employees in the Province must eliminate gender discriminatory wage practices in their establishments. To do so all public sector employers must post plans and begin making wage adjustments by January 1, 1990. Larger private sector employers (500+ employees) must also post plans by January 1, 1990, but they need not begin wage adjustments until January 1, 1991. Smaller employers have longer time lines. Those with 100-499 employees must post plans by January 1, 1991, and begin wage adjustments January 1, 1992.Private sector employers with 10-99 employees are not required to post plans, but must also achieve pay equity or be subject to complaint in 1993 or 1994.

For as long as it takes to achieve pay equity, an employer may phase in pay equity adjustments in annual amounts, rather than making the entire adjustment all at once. No employer is required to devote an amount greater than one percent of the previous year's payroll to pay equity adjustments, except that the public sector must complete adjustments by January 1, 1995. Once pay equity is achieved for all female job classes, it must be maintained through normal compensation practices. Employees who believe that undervaluation is once again affecting their compensation levels will have the right to complain to the Pay Equity Commission.

B. Principles and Methods

The purpose of the Act is to redress systemic gender discrimination in compensation practices, or in other words, to correct the undervaluation of work traditionally performed by women. Compensation includes wages and benefits.

The central principle of pay equity is that work traditionally performed by women should be paid the same as work of comparable value traditionally performed by men; for example in a hospital the work of nursing assistants has been compared to the work of plumbers and electricians. Within the Act, value refers to value to the employer and is to be measured by a gender neutral comparison system using the criterion of a composite of skill, effort, responsibility and working conditions. Comparisons are to be made within the employer's establishment, which is defined in geographic terms to enable preservation of regional compensation differences.

The Act requires employers to compare female and male jobs within each establishment to determine whether there has been an undervaluation of female jobs and to post pay equity plans and raise wages in female jobs accordingly. Where there is a union, the plan for bargaining unit employees is to be negotiated.

The Act established the Pay Equity Commission to oversee the implementation of the Act and help the workplace parties comply. An independent tribunal was established to adjudicate disputes.

C. Coverage

The Ministry of Labour estimates that there are 1.75 million women working for employers covered by the Pay Equity Act. The Act works well for about 1.4 million of this 1.75 million. The inability of the Act to benefit all of the women it covers is due to the fact that the job-to-job method of job comparison it prescribes is predicated upon the existence of a male job class which can be used as a comparator for a female job class. The reality is that not all establishments have a male job class that is appropriate for comparison purposes. For example, in a stock brokerage firm where the only female job classes are clerical and administrative and the only male job classes are professional, there may not be an appropriate male comparator for most, if not all, of the female job classes. Other establishments may have no male job classes at all.

This problem was recognized when the Act was passed. Rather than delay passage until a solution could be found, however, the Government proceeded with the Act and required the Pay Equity Office to investigate the problem and return with recommendations for amendments to the Act if that seemed to be appropriate. As stated above, the Office has completed its Report.

The amendment proposed by the Government as a means of improving the Act and benefiting more women working in Ontario is outlined in the next part of this paper.

II. PROPOSED AMENDMENTS AND ISSUES FOR DISCUSSION

A. Proportional Value Comparisons

As stated in the Introduction to this paper, the major focus of these consultations concerns the amendment to the Act introducing the proportional value method of making wage comparisons.

At present the Pay Equity Act prescribes a job-to-job comparison method, e.g. the job of receptionist compared to the job of parking attendant. This method was adopted because it provided a means of achieving pay equity in most establishments and yielded the clearest picture of existing wage disparities, thereby increasing the acceptance of the concept of pay equity itself.

As noted above, the problem of providing pay equity for female jobs where there was no male comparator job was acknowledged from the start and the Government made a commitment to deal with this problem by requiring the Pay Equity Office to study and make recommendations to solve it.

The Pay Equity Office conducted a number of quantitative and qualitative studies of the "predominantly female public and private sectors" and then did simulation studies to determine the effectiveness of several additional methods of finding comparators. Their Report recommended that the Act be amended to provide three additional methods for finding comparisons. These methods, proportional value, proxy comparison and average adjustment, are described in an appendix.

The Ministry of Labour is planning to adopt only the proportional value method. This choice will permit the majority of women who are presently excluded from benefiting under the Act the opportunity to do so. It will not provide a means of comparing jobs for women in workplaces where there are no male job classes at all. The Ministry estimates that while this will still exclude approximately 105,000 women from the benefit of the Act, it will mean that more than 90% of women working for employers covered by the Act will potentially benefit from pay equity.

The Ministry has rejected the other two methods proposed by the Office on the basis that they are incompatible with a basic principle of the Act: that work traditionally performed by women be paid the same as work traditionally performed by men that is of comparable value to the employer in the employer's establishment. Proxy comparisons and external average adjustments require cross-employer comparisons and contain potentially complex and problematic steps. Internal average adjustments are not based upon actual value.

The Ministry proposes that the proportional value approach to wage comparison be combined with the current job-to-job method in the following way:

- Plans already posted* using a job-to-job comparison method in which all female jobs have found comparators need not be reopened.

- Plans already posted by the time this amendment comes into effect, which have used a proportional value method of making comparisons, will be deemed not to have contravened the Act.

- Plans already posted using a job-to-job comparison method in which not all female jobs have comparators must be reopened to enable comparisons to be made by means of a proportional value method for those jobs without male comparators. The type of proportional value method to be used in making these additional comparisons must be negotiated with the relevant bargaining agent.

- Plans already posted (and those which should have been posted by the time this amendment comes into effect), which have used a job-to-job comparison method, whether or not all female jobs have found comparators, may, if the employer so chooses and the bargaining agent agrees, be completely redone using proportional value comparisons. Such new plans must be negotiated with the relevant bargaining agents.

- Plans not required to be posted by the time this amendment comes into effect may be completed using job-to-job comparisons, proportional value comparisons or both, so long as all female jobs have a comparison.

There is no intention to require employers to devote more than the 1% of their annual payroll currently demanded by the Act.

B. Other Amendments and Issues for Discussion

Two years of experience with the Act have revealed a number of ways in which the Act could be clarified and its administration be improved. In its Report to the Minister, the Commission noted that there are undefined terms and procedural ambiguities of concern to all parties which could be clarified by amendments. There are also a number of administrative improvements which could facilitate dispute settlement, minimize recourse to the Tribunal for routine matters, and contain administrative costs for all parties.

Some employers and unions have also experienced difficulties with certain restrictive aspects of the Act which require that wage increases and pay equity adjustments be made in ways which conflict with employers' and unions' normal and accepted business and collective bargaining practices.

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* For non-bargaining unit jobs, a posted plan is one which the employer has developed and posted. For bargaining unit jobs, a posted plan is one which the employer and bargaining agent have jointly negotiated, agreed to and posted.

i) Definitions and Miscellaneous

Definitions

"Position":

The term "position" is used, but not defined in the Act. Because it is a term without a common definition in the human resources field, setting out a definition in the Act could avoid confusion. It is proposed to define it in the following terms:

> "position" is a collection of the essential duties and responsibilities that constitute the total work assignment of one or more employees.

"Bargaining strength"

Section 8(2) provides that after pay equity has been achieved, pay differences between male and female job classes which are the result of "differences in bargaining strength" may be defensible. The term "bargaining strength" is not defined in the Act. Should it be legislatively defined or left to development by the Tribunal on a case by case basis?

"Employer"

There is no definition of "employer" in the Act. A decision or agreement on who is the employer is, however, necessary before a plan can be prepared. Where there is a dispute over who is the employer, recourse must be had to the Pay Equity Commission. Recent Tribunal decisions have begun the process of establishing case law on this matter, however, a well-settled judicial definition cannot be expected for some time.

In light of this, would there be an advantage to amending the Act to identify the major factors which would be used in determining who is the employer? Or, does the developing case law provide sufficient guidance?

Mergers and Acquisitions

In setting up a time-table for implementation based upon private employer size as of January 1, 1988, the effective date, the Act does not deal with the issue of how new employers, created either through mergers or by acquiring an existing business(es), are to implement pay equity. As a result, employers in such situations could be faced with a requirement to provide immediate pay equity.

The Ministry proposes, with one proviso, that new employers created through mergers or acquisitions should be subject to the same timetable and posting requirements as those governing other employers of the same size. The proviso is, that such an obligation would be deemed not to arise before the expiry of one year after the

merger or acquisition. This delay is necessary because some of the Act's posting and payment adjustment dates have already passed, and others will be imminent, before this amendment to the Act can be effected.

An alternative approach would be to adopt language similar to that found in the successorship provisions of the Ontario Labour Relations Act, section 63. The effect of doing this would be that where a business, or any part of it, is transferred, sold or otherwise disposed of, the new employer would assume the pay equity obligations and timetables, until the Pay Equity Commission determines otherwise.

Anonymity of Complaints

The Act provides that an employee who wishes to remain anonymous at the Tribunal level must notify the Tribunal in writing. The Act does not specify an equivalent means of ensuring anonymity during the complaint and investigative process (though this has been assumed).

The Ministry proposes to correct this inconsistency by providing that notice can be given to the Pay Equity Office. This change will make it clear that employee anonymity is to be respected throughout the proceedings.

Gender Neutral Job Comparison System

Cross-plan comparisons (required where comparators cannot be found within the bargaining unit, but exist elsewhere in the establishment) might result in several gender neutral comparison systems being used within one plan. This can lead to confusion in what measures of value are being compared.

The Ministry is proposing to amend the Act to provide that only one gender neutral comparison system be used within any one plan in an establishment. This does not prevent the use of different comparison systems in different plans, nor does it preclude the use of both job-to-job and proportional value comparison methodologies within the same plan.

Exceptions to this rule could be allowed by application to the Commission where circumstances warrant.

Plan Adjustments Where Circumstances Change

Section 22 of the Act allows an employee, group of employees or a bargaining agent to complain to the Pay Equity Commission that due to changed circumstances in an establishment a pay equity plan is no longer appropriate for any particular female job class. However, no provision was made for an employer to change a pay equity plan to meet changed circumstances. Such circumstances include technological changes, reorganization, etc.

The Ministry is proposing that employers be given the opportunity to respond to changed circumstances by giving notice to the employees in non-bargaining unit jobs that the pay equity plan is being amended, prior to the amendments being made by the employer; and by negotiations with the bargaining agent to amend the plan where employees are unionized. Such an amended plan would be treated as a new plan and subject to posting and objection requirements.

ii) Increased Administrative and Adjudicative Efficiency

Powers of Review Officers

Although the intent of the Act is that workplace parties will manage the pay equity implementation process themselves, some disputes will inevitably arise requiring mediation or adjudication. Since the parties are most likely to accept a solution in which they have participated, it is obviously preferable to foster the settlement of disputes. Where this is not possible, speedy adjudication is desirable.

The first objective of review officers is to assist the parties in settling disputes referred to them. Failing settlement, review officers have the power to make orders in some, but not all, types of disputes. These orders may be referred to the Tribunal by a dissatisfied party. The determination of issues outside of the review officers' jurisdiction must be made by the Tribunal. Tribunal adjudication is time-consuming and relatively expensive.

The Ministry proposes to increase the power of review officers to make orders in areas currently outside their jurisdiction. Examples are:

a) an order that a pay equity plan should be changed because of changed circumstances (s. 24(2));

b) an order that an employer and bargaining agent, if any, comply with any provision of the Act or regulations (s. 24(3) currently restricts such orders to compliance with subsections 7(1) and (2)); and

c) an order (ruling) that there has been no contravention of the Act or regulations. (Under the present Act there is no way for a Review Officer to reject a complaint, even one made in good faith, except to say that it was trivial, frivolous or vexatious.)

These orders would be subject to referral to the Tribunal by a dissatisfied party.

Time Limits for Objections to Pay Equity Plans

The Act currently states that employees shall have until the ninetieth day after the mandatory posting date to review a plan and submit comments to their employer (section 15(4)). An employer who posts a plan earlier than the mandatory posting date is still bound by this time frame.

In order to encourage the early posting of pay equity plans, the Ministry proposes that section 15(4) be amended to state that employees shall have until the ninetieth day after the actual posting date to review a plan and submit comments to their employer.

Time Limits for Requesting a Hearing before the Pay Equity Tribunal

It is proposed to provide time limits for requesting a hearing by the Tribunal to prevent lengthy time lapses before reviews and assure parties of the finality of orders of review officers. The Tribunal would retain the ability to grant a hearing beyond those limits where the matter involved has public importance or to avoid injustice.

Keeping Employees Informed

In keeping with the self-managed approach of the Act there is no requirement that employers file plans or progress reports with the Commission. Since the achievement of pay equity in an establishment may take several years, however, it has been suggested that there should be a mechanism for keeping employees informed about the implementation of the plan.

The Ministry proposes that until pay equity is achieved, a report on the progress of pay equity be provided to employees by their employer on an annual basis. This would take two forms:

1) Written information to individual employees who received pay equity adjustments during the year identifying in a meaningful way the pay equity adjustment received by that employee in the past year, the adjustment that will be received in the coming year and the balance, if any, outstanding; and

2) A general report to all employees outlining the number of job classes that achieved pay equity in the past year, how long the plan has been in effect and how many years there are to go (based on projections from the current year).

iii) Conforming to Common Practice

Percentage Wage Increases

Section 21(1) is a transitional section permitting small employers (those with fewer than 100 employees) to continue the practice of awarding percentage wage and

APPENDIX: JOB COMPARISON METHODS PROPOSED BY THE PAY EQUITY COMMISSION

In its "Report to the Minister . . . on Options Relating to the Achievement of Pay Equity in Sectors of the Economy which are Predominantly Female," October 18, 1989, the Pay Equity Office recommended that three new methods of comparing jobs and wages be added to the Pay Equity Act. These methods are proportional value, proxy comparisons and average adjustment. Each is briefly described below. More extensive definition and discussion can be obtained from the Report itself. (As noted in the text of this paper, the Ministry of Labour is proposing to amend the Act to include only the proportional value method.)

A. Proportional Value (Public and Private Sectors)

Although proportional value comparison is described as one "method" of making job and wage comparisons, there are in fact several different "types" of proportional value comparisons, some of which are straightforward and simple and others of which are comparatively complex. In the discussion below, three different types of proportional value comparisons are outlined. What all "types" of proportional value comparisons have in common, however, is that they permit relative comparisons to be made for all female jobs in an establishment where there are a certain minimal number of male jobs even though some, or all, of these male jobs would be inappropriate comparators for job-to-job comparisons under the present Act.

Proportional value is most commonly thought of in terms of a "wage line" approach to job and wage comparisons. This is, however, also the most complex of the three proportional value types. Expressed simply, the wage line approach enables an employer to plot a line on a graph showing the relationship between the value of a job and the wage it commands. When this is done separately for all female jobs and for all male jobs in an establishment, the comparison of the two lines enables the wage gap to be seen.

An alternative version of the wage line approach is to draw only a male wage line and to represent the female jobs by points. Comparisons can then be made between the female wage point and the male wage line. Pay equity is achieved when the points representing the female jobs are raised to their appropriate place on the male wage line.

A second type of proportional value permits female jobs without comparators to receive adjustments proportional to those received by female job classes with comparators. Thus, at the conclusion of the adjustment period of pay equity, female jobs in the establishment retain the relationship they had to each other before the adjustments were made. This method can be expected to be particularly useful in establishments where there are relatively few female jobs without an appropriate male comparator.

A third type of proportional value requires that all job evaluations (determined by the gender neutral comparison system) be expressed in points, after which a simple calculation is made to determine the average dollar value of each point for male job classes. This average dollar value per point is then applied to the points assigned to the

female job classes and used to determine the equitable wage. While there should be at least 3 male job classes from which the average is drawn, there do not need to be "appropriate" comparator jobs for this approach to work. Because of this, it is an approach that might be particularly suitable for small establishments where female and male jobs have very different value ranges.

B. Proxy Comparisons (Broader Public Sector)

Proxy comparisons can provide comparisons in the public sector where there are too few male jobs to use one of the proportional value approaches.

To make a proxy comparison, an employer "borrows" information from another employer who has male job comparators. The first employer, also called the "seeking organization" needs a description of job content and job rates in order to locate appropriate comparators for the female jobs in the "seeking organization." In doing so, it must control for general wage differences between the two organizations before assuming that the wage differential between the seeking organization's female job class and the borrowed male job class is based upon gender.

For example, suppose the seeking organization needs a comparator(s) for child care workers. One approach could be to use information from a municipality which has child care workers for whom there is a male comparator. In such an example, however, the appropriate adjustment might not be the actual amount received by the municipal child care workers, but rather the percentage increase needed to adjust their wage to equal that of their male comparator. This would take into consideration differences in establishment and maintain the general wage level differentials that exist between establishments.

The Pay Equity Office recognizes that this approach is complex and potentially intrusive and suggests that the seeking organization might use the Office as an intermediary. The Office would assist in selecting an appropriate proxy organization and proxy jobs, determining the wage gap found in the proxy organization and applying it to the seeking organization.

C. Average Adjustments

Average adjustment is designed to deal with the situation in which there are too few male jobs for proportional value comparisons and the employer is either in the private sector or so small that a simpler approach than proxy comparison can be readily used. The Report describes two versions of average adjustment.

The first of these is internal average adjustment. To use this approach there must be at least one pay equity adjustment based upon job-to-job comparison. This adjustment then becomes the basis upon which all other adjustment are calculated, for example, by granting the same percentage increase (or the average of percentage adjustments if there are more than one) to all female jobs in the establishment. This is a simple system, easy to implement, but it assumes that undervaluation exists in all female jobs equally.

External average adjustment is more complicated and is designed for use where there are no male job comparators at all in the establishment. It allows an employer to apply the average adjustment granted to female job classes in other employers' establishments within the same industry (geographically limited), to the female job classes in the employer's establishment. This method assumes not only that the same degree of undervaluation exists throughout the employer's establishment, but that it exists throughout the industry regardless of size of establishment, internal organization, or other factors.

It was expected that the Pay Equity Office would gather the industry information needed to determine an average adjustment.

As stated above, the "Report to the Minister of Labour by the Pay Equity Commission on Options Relating to the Achievement of Pay Equity in Sectors of the Economy which are Predominantly Female," provides detailed descriptions of these methods. The Report is available from the Government Book Store.